IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

O R D E R

SMT NAND KANWAR V/S STATE & ORS

S.B.CIVIL WRIT No. 1529 of 1992
UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

Date of order : 2nd March, 2007

PRESENT
HON'BLE SHRI N.P.GUPTA,J.

Mr. MS SINGHVI, for the petitioner.
Mr. BD PUROHIT, for the respondent.
Mr. HR SONI, AGA.

BY THE COURT:

This writ petition has been filed seeking to challenge the notification dt. 5.3.1990, published in the official gazette on 26.7.1990 Annexure-1, the notification dt. 6.4.1991, published in the official gazette on 29.8.1991 Annexure-5, and the notice dt. 4.2.1992 Annexure-6 is also sought to be quashed. The other prayer has been made seeking to restrain the respondents from interfering in the possession of the petitioner over the land in question.

Annexure-1 is a notification issued under Section

4(1)(2) of the Land Acquisition Act, 1894, hereafter to be referred to as the Act, notifying the Government's intention to acquire the lands mentioned therein, for the public purpose of developing housing colony by the Rajasthan Housing Board, while Annexure-5 is the composite notification issued under Section 17(4) and Section 6 of the Act, exercising powers under Section 17(1), and making declaration that the lands are required for the aforesaid public purpose, and also exercising powers under Section 7, and directing Special Officer, Urban Housing Development Department, Rajasthan Housing Board, Jaipur to acquire the land.

Factual averments in the writ petition are, that the land measuring 74 Bighas 3 Biswas, falling in various Khasras in village Airanpura is owned and possessed by the petitioner. The petitioner claims to be belonging to Royal family of the erstwhile Sirohi State, and the property has been claimed to be personal property of the ruler of Sirohi. Then, it is alleged that notification under Section 4(1) was issued, and was published in the official gazette Annexure-1. A notice was issued on 29.12.1990, in the name of the petitioner, by respondent no. 2 (Special Officer, Urban Housing Development) calling upon the petitioners to submit objections, though it was not served but when she came to know about this notice, objections were submitted. The objections, and copy of the notice, have been produced

as Annexure-2 and 3. Then, a representation was given to Minister for Local Self Government and Housing, on behalf of the petitioner, being Annexure-4. It is then alleged, that notification dt. 6.4.1991 was issued under Section 6 read with Section 17(4) of the Act, and was published in the official gazette on 29.8.1991, and is produced as Annexure-5. According to the petitioner, she came to know that a notice dt. 4.2.1992 has been issued by the respondent under Section 9 of the Act, though it was not served, but a copy has been produced as Annexure-6. According to the petitioner, on petitioner's representation Annexure-4, the Minister for Local Self Government called the comments, vide communication dt. 7.5.1991, Annexure-7, and thereafter the matter was referred to the Resident Engineer, Rajasthan Housing Board, Division-I, Jodhpur, who submitted report dt. 31.7.1991, Annexure-8, mentioning that it is not in the interest of the Housing Board to acquire the land, as most of the land has been earmarked for commercial use in the master plan, and the land available for residential use was very inadequate, apart from being too costly for the proposed scheme, for providing houses to the weaker sections and low income group. It is then alleged, that the Dy. Housing Commissioner submitted the recommendation to the Housing Board on 3.8.1991, on lines of this report, and in turn, the Secretary, Housing Board wrote a letter to the Dy. Secretary, Urban Development and Housing Department, pointing out non viability, and yet

submitting, that it will not be in the interest of the Board to give up the land. Whereupon the Secretary, Housing Board called the explanation, viz. when the acquisition is not viable, why Housing Board has recommended for its acquisition. Again non viability was reported, and the petitioner submitted representation to acquire alternative land, yet nothing has been done, and the notice under Section 9 of the Act has been issued. With these averments it is also alleged, that to the petitioner's knowledge notice under Section 4(1) has not been published in accordance with Section 4(1), inasmuch as public notice of the notification has not been given, nor has it been published in the two news-papers circulating in the locality, and that Section 6 notification has not been published in the two daily news-papers circulating in the locality. It is also contended in the writ petition, that the enquiry under Section 5-A has been dispensed with without showing any urgency in the matter, as the land is required for urban housing, for which there could be no urgency, so as to warrant dispensation of enquiry under Section 5-A of the Act. The notifications have been challenged also on the ground, that notification under Section 6 has been issued after expiry of one year of the publication of the notification under Section 4, and therefore, the same is without jurisdiction, and that the acquisition proceedings taken by the respondents is illegal, being contrary to the provisions of master plan:

Apart from the fact, that when even the authorities of the Board have recommended, that the land will be costly, and the Board will not be able to achieve the object of providing houses to low income group people, still the acquisition is being proceeded with, which is violative of Article 14 of the Constitution, apart from being illegal, and arbitrary exercise of powers. Interalia with these averments above reliefs have been claimed.

Rajasthan Housing Board applied to be impleaded as a party, and was ordered to be impleaded. The Housing Board filed its reply on 11.11.1992, disputing the averments of the petition. Mainly the stand taken by the Housing Board was, that the opinion alleged to have been given by the Resident Engineer has no relevancy for the purpose, because it is merely an opinion. Likewise it was contended, that the petitioner has failed to produce the letter alleged to have been written by the Secretary, Rajasthan Housing Board on 5.2.1992. Regarding publication, it was contended, that the notification under Section 4(1) of the Act has already been published in the official gazette, and it can safely be presumed, that it must have also been published in two daily newspapers circulating in the locality, and regarding publication of notification under Section 6, it was contended, that the petitioner has failed to make any positive averment about non-publication. Regarding urgency clause, it was pleaded that the urgency

of construction of house is well established, and is also well known. Then, it was contended that in view of the various decisions of this Court as well as Hon'ble the Supreme Court, that construction of residential houses for the public at large is of a great importance and is also of utmost urgency, because this is a burning problem through-out India, and therefore, it is futile to contend that there was no urgency for issuing notification under Section 6 read with Section 17(4). It was also contended that the publication of notification under Section 4 in the local newspapers is directory, and not mandatory, and the petitioner cannot be said to be a person aggrieved by reason of the same. It was also contended, that discretion of acquiring a particular land, in a particular locality, lies with the State Government, and not with the petitioner, and the only right which remains with the petitioner, after publication of the notification under Section 6 read with Section 17(4) is, to get compensation, after passing of the award from non-petitioner no.2.

To this reply a rejoinder was filed by the petitioner, controverting the stand taken by the Housing Board. It was contended, that it was not open to the Housing Board to disown the report submitted by the Resident Engineer, which report has been given with detailed reasons, and cannot be said to be mere opinion. It was contended, that the matter of publication cannot rest

in the realm of presumption, in the event of notification being published in the gazette. The other averments of the writ petition were reiterated. Then, along with the rejoinder the petitioner also produced certain documents, like letter of the State Government seeking report from the Collector dt. 22.5.1992 Annexure-11, consequential report obtained by the Collector Annexure-12, and the Collector's report Annexure-13, reporting that the price of the land sought to be acquired is exorbitantly high, and the land consist in three pieces of land, situated in three different places, far away. Consequentially it could be hardly of any utility for establishment of Housing Board Colony for low income group.

The State Government also filed reply to the writ petition on 12.12.2002, mainly it was contended, that the notice has been executed at the places such as Municipality, Sheoganj, Tehsil Office Sheoganj, public places of Airanpura, Panchayat Office Airanpura, and the office of the Collector. Regarding Resident Engineer's report, it was contended, that that is not related to resolve the present controversy, it does not help the petitioner in any manner, as it is only a departmental correspondence, as the Resident Engineer is not a competent authority to take any decision in this behalf. Regarding other letters also, stand taken was, that they are departmental correspondence. It was contended that Section

4 notification was published in Dainik Pratinidhi and Jalte Deep on 15.3.1990 and 18.3.1990 respectively, and notification under Section 6, read with Section 17(4) was also published in Jangan and Jalte Deep on 23 and 25th January, 1992, copies whereof are produced as Annexure R-3 and R-4 respectively. Then, it was pleaded that the State Government has invoked the provisions of Section 17 of the Act in the public interest, and not otherwise, as alleged by the petitioner. It was contended that notification under Section 6 was issued well within the prescribed period of time, and that the recommendation of the local authority is not sustainable in the eye of law, as it is the State Government who is to decide the acquisition of the land.

To this reply again a rejoinder was filed by the petitioner producing the list of private properties, and covenant, as Annexure-14 and 15 respectively. It was positively contended that the public notice of the substance of the notification was not given, and incorrect stand has been taken. In this regard the petitioner sought to produce Annexure-16 to 25, about non-publication of the notifications under Section 4 and 6, and about the fact of Jangan having no circulation in the locality, and about the circulation of Jalte Deep also being very poor, and about the newspaper being not in the local language. Strong reliance was also placed on the report of the Resident Engineer, and the other stands taken in the writ petition

were reiterated. It was also contended, that the action of the State Government has been arbitrary, unreasonable and is out come of total non application of mind.

Respondents no. 1 and 2 filed sur-rejoinder. It was contended therein, that the documents produced do not mention anything about the property in question, i.e. identity of Khasra numbers, and thus Annexure-14 and 15 do not help the petitioner. Then, it was contended that the petitioner wrongly approached various authorities to seek information about publication, rather should have approached the Land Acquisition Officer, and that the original record of the proceedings shall be kept ready for perusal, and that the Resident Engineer also issued various letters to various authorities seeking information about publication, and it was reported to have been published, copies of the letters have been produced, collectively as Annexure R-5 and R-6. Thus, Annexure-16 to 21 were denied to be of any relevance. Then, the allegation about non-circulation of Jangan was also denied, and it was also contended that the certification is not issued by competent authority, rather it was only a note made on the letter, which is of no consequence: Apart from the fact that the note does not relate to the period in question, while regarding Annexure-23 it was contended, that even according to this letter, the paper was in circulation. It was submitted that notification was pasted, and the original

record will be kept ready. Then, it was reiterated that it is within the domain of the State Government to acquire the land in the interest of public at large, and the petitioner's individual interest cannot prevail over the public interest. Then, the other pleadings taken in the original reply was reiterated.

Writ petition was admitted on 17.3.1992, and interim stay was granted staying further proceedings in pursuance of notification Annexure-5 and notice Annexure-6. Then, when the matter came up for hearing, on 24.5.2006 an order was passed, directing the learned counsel for the State to produce record of the appropriate Government, to show the circumstances, in which notification under Section 17(4) of the Act was issued. Then, the matter was taken up on 31.5.2006; on which date the record was made available, and this Court noticed, that according to the record, the Secretary, Rajasthan Housing Board, by a communication dated 22.1.1991, requested to the Secretary to the Government of Rajasthan, Department of Urban Development and Housing for adopting the procedure prescribed under Section 17 of the Act by issuing a notification under Section 17(4) of the Act, and that, the reasons for adopting urgent provisions, as quoted in the communication, were quoted in the order sheet, and then the note-sheets, with regard to de-acquisition of land were also noticed in the order-sheet. I may gainfully reproduce the entire

order-sheet dt. 31.5.2006 as such, which is as under;-

"S.B.CIVIL WRIT PETITION NO. 1529/1992

DATE OF ORDER : 31.05.2006

HON'BLE MR. GOVIND MATHUR, J.

Mr. K.L. Thakur, Addl. Advocate General.

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In pursuant to the order dated 24.5.2006 relevant record is shown to the Court by learned Addl. Advocate General. According to the record shown to the Court the Secretary, Rajasthan Housing Board, Jaipur by a communication dated 22.1.1991 made a request to the Secretary to the Government of Rajasthan, Department of Urban Development and Housing for adopting the procedure prescribed under Section 17 of the Act of 1894 by issuing a notification under sub-section 4 of Section 17 of the Act. The reasons for adopting urgent provisions as given in the communication dated 22.1.1991 reads as under:

"अत: ग्राम एरनपुर तह० शिवगंज जिला सिरोही की संलग्न खसरा सूची के अनुसार 89 बीघा 08 बिस्वा भूमि अवासि का प्रस्ताव आपकी सेवामें केन्द्रीय भूमि अवासि अधिनियम 1894 की धरा 17(4) की विज्ञसि जारी कराने व नियमानुसार भूमि अवास करने हेतु प्रेषित किये जा रहे हैं ।

उक्त योजना के सम्बन्ध में विभिन्न आप वर्गों के पंजीकृत आवेदकों की सूचना निम्न प्रकार हैं:-

1. <u>श्रेणीवार आवेदकों की संख्या:</u>

(अ) आर्थिक दृष्टि से कमजोर आय वर्ग	62	
(ब)अल्प आय वर्ग		262
(स)मध्यम आय वर्ग (अ)		-
(द)मध्यम आय वर्ग (ब)		-
(य)उच्च आय वर्ग		-

कुल= 324

2. भूमि आवासीय योजना हेतु उपयुक्त हैं ।
3. पैरा नं०-3 व 4 के प्रस्ताव पूर्व में योजना नहीं होने से लागू नहीं होते हैं।
4. धारा 17(4) प्रस्ताव हैं।
5. राजकीय भूमि उपलब्ध नहीं होने की दशा में ही निजी भूमि अवासि का प्रस्ताव भेजा जा रहा हैं । जो योजना हेतु प्रत्येक दृष्टि से उपयुक्त हैं। तकनीकी दृष्टि से जांच कर ली गई हैं।
6. मंडल के पास पूर्व में कोई भूमि उलब्ध नहीं हैं।
7. खसरा प्लान (साइंट प्लान) की प्रति धारा 4(1)(2) प्रस्ताव के साथ भिजवाई जा चुकी है।

अत: निवेदन हैं कि काफी अर्से से पंजीकृत आवेदकों को शीघ्र आवास सुविधा उपलब्ध कराने हेतु उपरोक्त भूमि की विज्ञप्ति भूमि अर्जन अधिनियम 1894 (1894 का केन्द्रीय अधिनियम-1) की धारा 17(4) के अर्न्तगत विज्ञप्ति शीघ्र जारी कराने की व्यवस्था करावें ताकि भूमि अवासि की अग्रिम कार्यवाही शीघ्र संभव हो सके ।"

The appropriate Government after considering the request made by the Secretary, Rajasthan Housing Board, Jaipur under the communication dated 22.1.1991 accepted the same on 14.2.1991. The note-sheet drawn in this regard reads as under:

"कृपया विचाराधीन पत्र का अवलोकन करें Secy RHB ने शिवगंज सिरोही में आवासीय कोलोनी निर्माण हेतजु भूमि अवास करने बाबत धारा 17 (4) के तहत अधिसूचना का प्रस्ताव भिजवाया है, इस क्रम में विभाग द्वारा धारा 4(1) की अधिसूचना जारी कर दी हैं जिसका पृष्ठ 6/c पर अवलोकन किया जा सकता है। RHB का प्रस्ताव उचित प्रतित होता हैं अत: मान्य हो तो इस मामले में धारा 17(4) अधिसूचना जारी कर दी जावे।

आदेशार्थ"

It is also noticed from perusal of the record that the question with regard to de-acquisition of land was also under consideration of the State Government even after issuance of the notification under Section 17(4) of the Act of 1894. However, no definite decision has yet been taken by the respondents. A note made by the Secretary, Urban Development and Housing on 9.3.1992 is relevant to be noticed where necessary details with regard for de-acquiring the land with advise to Rajasthan Housing

Board for locating some cheaper land is given. The note of the Secretary, Urban Development and Housing reads as under:

> "May kindly peruse the position with regard to acquisition of 89 Bighas 3 Biswas of land by the Rajasthan Housing Board in Village Airanpur, Tehsil Shiv Ganj, District Sirohi at paras 45-50/N and further at paras 64-66/N above.
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> 69. Briefly it is stated that Housing Board has registration of 72 EWS and 262 of LIG applicants. There are no registrations of MIG-A, MIG-B and HIG applicants. For them, vide their letter dated 12.1.92, the Rajasthan Housing Board has sought the acquisition of the land and a notification u/s.r of the Land Acquisition Act was issued. Another notification u/s.17(4) read with Section 6 of the Act has been issued. Against this, the Private Secretary to the H.H. Maharajadhiraj, Sirohi has represented and sought the de-acquisition vide their letter dated 25.3.91 (petitioner.15-19/c). The comments of the RHB were received first vide their letter dated 24.7.91. In their letter, the RHB has admitted that out of 89 Bighas 3 Biswas of land; 67 Bighas 10 Biswas land has been shown for commercial and other purposes in the Master Plan, leaving only 21 Bighas 13 Biswas for residential purposes. The cost of agricultural land has been shown between Rs.2 to 2.5 lakhs and this would be costly for residential purposes. Further, for accommodating all registered persons, they need 35 Bighas of land which would be less than what is available. Even after stating all this, the RHB has requested for not de-acquiring the land. Since this was not understandable, the clarification sought from them vide their letter dated 5.2.92 (petitioner.48/c) may be perused. Through this letter, the RHB has taken a stand that on the land shown for commercial purposes and other purposes which means Bus stand, Hospital and public purposes can only be developed by the Rajasthan Housing Board and should not be left to be developed by private entrepreneurs. The RHB also states that there are 650 applicants in Sumerpur which is an adjoining town and it may be necessary to accommodate some of them in Shivganj, due to which the demand of land might be increased. For these reasons, the RHB has not favoured for de-acquiring the land.
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> 70. The perusal of the two replies from the Rajasthan Housing Board shows that there are contradictions but one aspect is there that the acquisition

cost will be high and further by adding development charges, the cost of land on which construction will be taken up, will also go up. Thus the houses would be costly to the weaker sections and LIG Persons. Further more, for even accommodating 334 persons of Shivganj, the land in question which would be 21 Bighas 13 Biswas will also be inadequate. If the Housing Board intends to accommodate some more persons out of 650 of Sumerpur, there would be more requirement of the land and for that they will have to acquire some other land.

71. Not only this, the Rajasthan Housing Board has registered the applicants in Shivganj without first finding land before taking up registrations. The Housing Board should have taken care in finding Government vacant land or the land which requires less payment of compensation amount so that the burden of higher cost does not shift on EWS and LIG persons. Therefore, Rajasthan Housing Board should find some other land which should be cheaper including the Government Siwai chak land. They should also ascertain from each applicant whether they are still interested, because the registration was done possibly in the year 1989 as the letter of acquisition was sent on 12.1.90.

72. As regards the land use for commercial purposes and other public purposes, it is not only for Rajasthan Housing Board that it would take up construction of Bus stand or commercial complex. It can be developed by the local Bodies which could be Municipality and for that they may come up with a scheme and proposals afresh.

73. In view of the above situation, Government may deacquire the entire land and advise the Rajasthan Housing Board as stated above for locating the cheaper land after ascertaining from the registered persons, if they are still interested."

The writ petition be listed for hearing on 10.7.2006.

(GOVIND MATHUR),J."

Then, the matter was released from part-heard, and

was then heard by me.

Arguing the writ petition it was contended, that there has been a non-compliance of the provisions of Section 4 and 6, inasmuch as substance of the notification was not published on the conspicuous place in the locality, where the land is situated, and regarding Section 6 notification, it was contended, that it is said to be published in one of the newspaper, Jangan which has no circulation in the locality. The other ground raised was, that the dispensation of enquiry under Section 5-A of the Act is wholly illegal, inasmuch as, there is no material available on record to invoke urgency clause and dispense with the enquiry, so much so that only on the letter of the Secretary of the Housing Board, without any application of mind, Section 17(4) is invoked, while in the letter, which purportedly conveyed the grounds of urgency, which has been reproduced in the order sheet dt. 31.5.2006, no ground whatever, to show any urgency, has been disclosed, so as to dispense with the enquiry under Section 5-A. Thus, there was no material available with the State Government to be satisfied, to dispense with the enquiry, and as a matter of fact also, no such satisfaction has been recorded by the State Government. Reliance was placed on the judgment of Hon'ble the Supreme Court, in Narayan Govind Gavate Vs. State of Maharashtra, reported in AIR 1977 SC-183, Om Prakash Vs. State of U.P. reported in AIR 1998 SC-2504, and

Union of India Vs. Mukesh Hans, reported in AIR 2004 SC-4307. Learned counsel also contended that the pre and post notification delays do vitiate the notification issued under urgency clause. It was then contended, that the very exercise of acquisition is wholly arbitrary, and colourable exercise of powers, inasmuch as the land can possibly not be put to the use, for which it is purported to be acquired, inasmuch as out of the entire land sought to be acquired, 67.5 Bighas of land is shown to be for commercial use in the master plan, and the remaining land cannot fulfill the purpose for which it is required. In this regard reliance was placed on Annexure-7, 8 and 9, which shows that minimum requirement is of 35 Bighas of land. Then, it was also contended, relying upon the note-sheets' para no. 69, 70 and 71, as quoted in the order sheet dt. 31.5.2006, that the land is not at all suitable for the purpose for which it is sought to be acquired, and is not economically viable, and therefore, also acquisition is required to be quashed.

On the other hand, learned counsel for the State, Shri H.R. Soni controverted the submissions, and contended, that it was vide letter dt. 12.1.1990, that a request for acquisition was made. Then, reliance was placed on note-sheet in para-18 dt. 30.1.1990, to support the invocation of provisions of urgency clause, and relying upon the judgment in Chameli Singh Vs. State of U.P., reported in

(1996) 2 SCC-549, Union of India Vs. Praveen Gupta, reported in AIR 1997 SC-170, and State of T.N. Vs. L. Krishnan, reported in (1996) 1 SCC-250, it was contended that pre and post notification delay cannot be a ground to challenge the dispensation of enquiry under Section 5-A, or notification under Section 17(4), and that there is no need to pass a reasoned order for invoking urgency clause, and that High Court cannot examine the material, or the reasons for urgency, as an appellate court, as it is a matter of subjective satisfaction of the State Government, which is arrived at on the basis of the material on record. Then, reliance was placed on the judgment of Hon'ble the Supreme court, in S.H. Rangappa Vs. State of Karnataka, reported in 2001(2) Apex Court Journal-541 to contend, that in case where Section 17(4) is invoked, compliance of Section 6 is not necessary.

Mr. B.D. Purohit appearing for the Housing Board supported the stand taken by Mr. Soni.

In rejoinder Mr. Singhvi relies upon the judgment of Hon’ble the Supreme Court, in Union of India Vs. Krishan Lal Arneja, reported in AIR 2004 SC-3582, and submitted that in this case the judgment in Chameli Singh’s case and earlier judgments in Aflatoon’s case, and Narayan Govind Gavate’s case so also Deepak Pahwa’s case (Deepak Pahwa Vs. Lt. governor of Delhi reported in AIR 1984 SC-1721) have

been considered, and it has been laid down that Section 17 confers extraordinary powers on the authorities under which it can dispense with the normal procedure laid down under Sec. 5-A of the Act in exceptional case of urgency, and that such powers cannot be lightly resorted to except in case of real urgency enabling the Government to take immediate possession of the land proposed to be acquired for public purpose. Then, it has further been held that the public purpose, however, laudable it may be, by itself is not sufficient to take aid of Section 17 to use this extraordinary power, as use of such power deprives a land owner of his right in relation to immovable property to file objections for the proposed acquisition and it also dispenses with the enquiry under S. 5-A of the Act. It was then held that the authority may have subjective satisfaction of the need for invoking urgency clause under S. 17 keeping in mind the nature of the public purpose, real urgency that the situation demands, and the time factor i.e. whether taking possession of the property can wait for a minimum period within which the objections could be received from the land owners and the inquiry could be completed. In other words if power under S. 17 is not exercised, the very purpose for which the land is being acquired urgently would be frustrated or defeated. Then, it has also been cautioned that while applying the emergency clause the State should indeed act with due care and responsibility, invoking urgency clause cannot be a

substitute or support for the laxity, lethargy or lack of care on the part of the State Administration. Laying down the principles, setting aside of notification, invoking emergency clause, was upheld.

I have considered the submissions, and have gone through the papers available on record.

It may be observed here, that Mr. Soni was also having with him the original file, and therefrom it was shown, that the notification under Section 4 was locally also published, by pasting the substance of notification on conspicuous place in the locality. Learned counsel for the petitioner after seeing that report, tried to contend, that what has been published on conspicuous place in the locality, cannot be said to be the substance of the notification, but then in my view, from perusal of the notice pasted, it is clear, that it does contain the substance of the notification. In that view of the matter, the alleged deficiency in the publication of Section 4 notification need not detain me.

So far as the local publication of the notification under Section 6 is concerned, in State of Haryana Vs. Raghubir Dayal reported in JT 1998(4) SC-507, it has been held by Hon'ble the Supreme Court in para-8 as under:-

> "The question emerges whether the non-publication of the substance of the declaration under Section 6(1) equally be mandatory and its omission renders the declaration invalid? The purpose of the declaration under Section 6 is to render the land notified therein as that needed conclusively for public purpose. So we are of the opinion that the notification under Section 4(1) should not be invalidated for non-compliance of the notification under Section 6. It is true that the language in Section 6(2) is in pari materia with Section 4(1). The purpose of publication of the declaration is to give effect of the conclusiveness of the extent of the land needed for the public purpose or for a company as made under Section 6(3) of the Act. Since there is an opportunity already given to the owner of the land or persons having interest in the land to raise their objections during the enquiry under Section 5A, or otherwise in case of dispensing with enquiry under Section 5-A unless they show any grave prejudice caused to them in non-publication of the substance of the declaration under Section 6(1), the omission to publish the substance of the declaration under Section 6(1) in the locality would not render the declaration of Section 6 invalid. We are not intending to say that the officer should not comply with the requirement of law and it is their duty to do it. But their dereliction to do so per se does not render the declaration under Section 6 illegal or invalid. Therefore, the word 'shall' used in sub-Section (2) of Section 6 should be construed to be only directory but not mandatory."

In that view of the matter, the contention about the non-publication of the notification under Section 6 cannot be said to vitiate the acquisition proceedings.

The most important question that survives thereafter is about the sustainability of dispensation of the enquiry under Section 5-A by invoking the provisions of Section 17. In this regard I may first deal with the cases cited at the Bar.

In Narayan Govind Gavate's case the Bench comprising of three Hon'ble Judges of Hon'ble the Supreme Court was considering the validity of elimination of summary proceedings, where the land was sought to be acquired for the purpose of development of industrial area and residential purpose, and it was held, that on the face of it, does not call for any such action, barring exceptional circumstances, as to make immediate possession, without holding even a summary enquiry under Section 5-A of the Act, imperative, as such schemes generally take sufficient period of time to enable at least summary inquiries under Section 5-A of the Act to be completed without any impediment whatsoever to the execution of the scheme. It was also held, that the immediate purpose of a notification under Sec. 4(1) of the Act is, to enable those who may have any objection to make, to lodge them for purposes of an enquiry under Sec. 5-A of the Act, and that for dispensing with the enquiry under Section 5-A, the mind of the officer or authority concerned has to be applied to the question, whether there is an urgency of such a nature, that even the summary proceedings under Section 5-A of the Act should be eliminated. Then, it was further held, that although the particular onus of proving facts and circumstances lying especially within the knowledge of the official who formed the opinion, which resulted in the notification under Sec. 17(4) of the Act, rests upon that

official. The recital, if it is not defective, may obviate the need to look further, but there may be circumstances in the case, which impel the court to look beyond it, and at that stage, Section 106 Evidence Act can be invoked by the party assailing an order or notification. It is most unsafe in such cases for the official or authority concerned to rest content with non-disclosure of facts especially within his or its knowledge by relying on the sufficiency of a recital. Such an attitude may itself justify further judicial scrutiny. In that case it was denied on behalf of the State, that urgency clause has been applied without any valid reason, and that the third respondent formed opinion that the lands were urgently required for the public purpose mentioned therein, and accordingly Section 17(4) was invoked, and after referring to various provisions of the Evidence Act, in para-41 and 42 it was held as under:-

> "41. Again, the uniform and set recital of a formula, like a ritual or mantra, apparently applied mechanically to every case, itself indicated that the mind of the Commissioner concerned was only applied to the question whether the land was waste or arable and whether its acquisition is urgently needed. Nothing beyond that seems to have been considered. The recital itself shows that the mind of the Commissioner was not applied at all to the question whether the urgency is of such a nature as to require elimination of the enquiry under Section 5A of the Act. If it was, at least the notifications gave no inkling of it at all. On the other hand, its literal meaning was that nothing beyond matters stated there were considered.
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> 42. All schemes relating to development of industrial and residential areas must be urgent in the context of

> the country's need for increased production and more residential accommodation. Yet, the very nature of such schemes of development does not appear to demand such emergent action as to eliminate summary enquiries under Section 5A of the Act. There is no indication whatsoever in the affidavit filed on behalf of the State that the mind of the Commissioner was applied at all to the question whether it was a case necessitating the elimination of the enquiry under Section 5A of the Act. The recitals in the notifications, on the other hand, indicate that elimination of the enquiry under Section 5A of the Act was treated as an automatic consequence of the opinion formed on other matters. The recital does not say at all that any opinion was formed on the need to dispense with the enquiry under Sec. 5A of the Act. It is certainly a case in which the recital was at least defective. The burden, therefore, rested upon the State to remove the defect, if possible, by evidence to show that some exceptional circumstances which necessitated the elimination of an enquiry under Section 5A of the Act and that the mind of the Commissioner was applied to this essential question. It seems to us that the High Court correctly applied the provisions of Section 106 of the Evidence Act to place the burden upon the State to prove those special circumstances although it also appears to us that the High Court was not quite correct in stating its view in such a matter as to make it appear that some part of the initial burden of the petitioners under Sections 101 and 102 of the Evidence Act had been displaced by the failure of the State to discharge its duty under Section 106 of the Act. The correct way of putting it would have been to say that the failure of the State to produce the evidence of facts especially within the knowledge of its officials, which rested upon it under Section 106 of the Evidence Act, taken together with the attendant facts and circumstances, including the contents of recitals, had enabled the petitioners to discharge their burdens under Secs. 101 and 102 of the Evidence Act."

Then, in Om Prakash's case also, the land was sought to be acquired for planned development of city or town, and after considering all previous judgments including the one in A.P. Sareen's case (A.P. Sareen Vs. State of U.P. reported in (1997) 9 SCC-359) it was held,

that it cannot be held to be not laying down any absolute proposition, that whenever acquisition is to take place for planned development of city or town, Section 5-A should be treated to be almost otiose or inoperative. Such is not ratio of the aforesaid decision, and nothing to that effect can even impliedly be read in the aforesaid observation, which is of general nature. It only suggests that in appropriate cases, urgency clause can be invoked when the land is proposed to be acquired for planned development of city or town. Then, the judgment in Ghaziabad Development Authority Vs. Jan Kalyan Samiti reported in 1990 2 SCC-365 was also considered which was a case for acquiring land for constructing a Sewage Treatment Plant in Okhla, area where power under Section 17(4) was invoked. Then, in para-25 it was held, that the conclusion becomes inevitable that the action of dispensing with inquiry under Section 5-A of the Act in the present case was not based on any real and genuine subjective satisfaction, depending upon any relevant data, available to the State authorities, at the time when they issued the impugned notification under Section 4(1) of the Act, and dispensed with Section 5-A inquiry. In this case the judgment in Narayan Govind Gavate's case was also considered, so also the judgment in State of U.P. Vs. Smt. Pista Devi, reported in AIR 1986 SC-2025 was also considered.

Then, Mukesh Hans' case involved the precise

question as to whether the competent authority who passed the order under Section 17(4) did not apply any mind for the need of dispensation of the enquiry under Section 5-A. In this case after considering various previous judgments it was held in para-32 as under:-

> "It also indicates the mere existence of an urgency under Section 17(1) or unforeseen emergency under Section 17(2) would not by themselves be sufficient for dispensing with 5-A inquiry. If that was not the intention of the Legislature then the latter part of sub-section (4) of Section 17 would not have been necessary and the Legislature in Section 17(1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically 5-A inquiry will be dispensed with. But then that is not language of the Section which in our opinion requires the appropriate Government to further consider the need for dispensing with 5-A inquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while dispensing with 5-A inquiry does not mean that in and every case when there is an urgency contemplated under Section 17(1) and unforeseen emergency contemplated under Section 17(2) exists that by itself would not contain the need for dispensing with 5-A inquiry. It is possible in a given case the urgency noticed by the appropriate Government under Section 17(1) or the unforeseen emergency under Section 17(2) itself may be of such degree that it could require the appropriate Government on that very basis to dispense with the inquiry under Section 5-A but then there is a need for application of mind by the appropriate Government that such an urgency for dispensation of the 5-A inquiry is inherent in the two types of urgencies contemplated under Section 17(1) and (2) of the Act."

Then, in para-37 it was also found, that in almost all the notings in the file, there is no reference to the need for invoking Section 17(4), indicates, that the Lt. Governor was not apprised of all necessary and relevant

facts before he took the decision in question. Therefore, also the dispensation of enquiry was found to be bad.

Coming to the case cited by Mr. Soni; Chameli Singh's case was a case where the land was sought to be acquired for providing houses to Dalits, Tribals and poor, and notification of urgency clause was upheld. In para-15, relying upon the Constitution Bench judgment of Hon'ble the Supreme Court in Aflatoon Vs. Lt. Governor of Delhi, reported in (1975) 4 SCC-285, and judgment in Pista Devi's case, the acquisition for planned development in Delhi and Merrut, invoking urgency clause was upheld, and it was held that pre-notification and post-notification delay, caused by the officer concerned does not create a cause to hold that there is no urgency. Then, referring to the judgment in Rajasthan Housing Board Vs. Shri Kishan, reported in (1993) 2 SCC-84, it was found, that the satisfaction under Section 17(4) is a subjective one, and that so long as there is material upon which Government could have formed the said satisfaction fairly, the Court would not interfere, nor would it examine the material as an appellate authority. Then, Narayan Govind Gavate's case was also considered, and the pre-notification and post-notification delay of good long time in that case was found to be accelerating the urgency, by holding, that larger the delay, greater be the urgency. So long as the unhygienic conditions and deplorable housing needs of Dalits, Tribes

and the poor are not solved or fulfilled, the urgency continues to subsist, and it was held, that when the Government, on the basis of the material, constitutional and international obligation, formed its opinion of urgency, the court, not being an appellate forum, would not disturb the finding, unless the court conclusively finds the exercise of the power malafide.

Then, so far as the judgment in L. Krishnan's case is concerned, that also is a case where the land was acquired for the purpose of housing board. One of the points decided in that case was, that existence of the housing scheme framed by the Housing Board under the provisions of the relevant Act is not sine qua non for proceeding with the acquisition. Then, it was also held that the acquisition for the purpose is a public purpose, and the notification does not suffer from any vagueness. In my view that judgment did not concern with the question of issuance of notification invoking urgency clause, and therefore, that is not relevant for the purpose of present controversy.

So far as Praveen Gupta's case is concerned, in that case the land was sought to be acquired for shifting timber business from the old city of Delhi, and it was held in para-9 as under:-

> ".....Therefore, there was no need to pass any reasoned order to reach the conclusion that there is urgency so as to dispense with the enquiry under Section 5-A in exercise of power under Section 17(4)..."

Then, coming to the judgment in S.H. Rangappa's case; to say the least, that judgment has no relevance to the controversy involved in the present case, inasmuch as the controversy involved in S.H. Rangappa's case was, as to what is the outer limit, within which the declaration under Section 6 is to be published, and the limitation prescribed in Section 6, in co-relation with the date of notification under Section 4, and it was held, that Section 6(2) does not provide any time limit, within which the declaration under Section 6(1) is to be published. What is required is, that declaration should be made within a period of one year, and for this purpose the earlier judgment of the Bench comprising of Hon'ble four Judges in Khadim Hussain's case (Khadim Hussain Vs. State of U.P. reported in 1976(1) SCC-843) was reiterated, and the contention based on the judgment of Hon'ble the Supreme Court in Bachhittar Singh Vs. The State of Punjab reported in 1962 Suppl.(3) SCR-713, Krishi Utpadan Mandi Samiti Vs. Makrand Singh reported in [1995(2) SCC-497], and Eugenia Vs. State of Goa [1997(8) SCC-47], that Khadim Hussain's case requires reconsideration was turned down.

Then in Krishan Lal Arneja's case Hon'ble the

Supreme Court has considered practically all previous judgments, and then in para-17 held as under:-

> "17. Section 17 confers extraordinary powers on the authorities under which it can dispense with the normal procedure laid down under Section 5A of the Act in exceptional case of urgency. Such powers cannot be lightly resorted to except in case of real urgency enabling the Government to take immediate possession of the land proposed to be acquired for public purpose. A public purpose, however laudable it may be by itself is not sufficient to take aid of Section 17 to use this extraordinary power as use of such power deprives a land owner of his right in relation to immovable property to file objections for the proposed acquisition and it also dispenses with the inquiry under Section 5A of the Act. The Authority must have subjective satisfaction of the need for invoking urgency clause under Section 17 keeping in mind the nature of the public purpose, real urgency that the situation demands and the time factor i.e. whether taking possession of the property can wait for a minimum period within which the objections could be received from the land owners and the inquiry under section 5A of the Act could be completed. In other words, if power under section 17 is not exercised, the very purpose for which the land is being acquired urgently would be frustrated or defeated. Normally urgency to acquire a land for public purpose does not arise suddenly or overnight but sometimes such urgency may arise unexpectedly, exceptionally or extraordinarily depending on situations such as due to earthquake, flood or some specific time bound project where the delay is likely to render the purpose nugatory or infructuous. A citizen's property can be acquired in accordance with law but in the absence of real and genuine urgency, it may not be appropriate to deprive an aggrieved party of a fair and just opportunity of putting forth its objections for due consideration of the acquiring authority, while applying the urgency, the State should indeed act with due care and responsibility. Invoking urgency clause cannot be a substitute or support for the laxity, lethargy or lack of care on the part of the State Administration."

Thus, the legal position emerging from above

judgments is, that it cannot be laid down as a rule of thumb, that in every case where the land is required for planned development, or housing, urgency clause has to be invoked, or cannot be invoked, as it would depend upon facts and circumstances of each case. The other legal position that emerges is, that the satisfaction contemplated under Section 17 is a subjective satisfaction, to be arrived at on the basis of the material on record, and the High Court is not to act as a court of appeal, to examine that satisfaction, where it is based on material.

I therefore have to examine the case only from the stand point, as to whether there was material on record, available with the competent authority, to record satisfaction, about existence of urgency, to dispense with the enquiry under Section 5-A. Obviously, if the material is there, the satisfaction may not be required to be interfered with, and if there is no material, the recording of satisfaction, for the notification under Section 17(4) can possibly not stand.

At this place I may again revert back to the order sheet of this Court dt. 31.5.2006, wherein the communication dt. 22.1.1991 of the Secretary, Housing Board has been quoted, which obviously is supposed to contain reasons for urgency, as after receipt of this communication, only note prepared is, as quoted in the

order-sheet quoted above, viz. that vide paper under consideration proposal had been sent for issuance of notification under Section 17(4) as notification under Section 4(1) has already been issued. The letter is available at page-6C, the proposal of Housing Board appears to be proper, therefore, if agreed notification under Section 17(4) may be issued. This note obviously is a note prepared by the clerk concerned, and then the authorities in hierarchy have gone on to put initials, which, according to the counsel for state, this court is to assume to be the approval of the note prepared by the clerk. Thus, the perusal of the file demonstrably establishes, that the notification is an out come and result of total non application of mind, much less is it an out come of satisfaction of the competent authority, about existence of requisite urgency.

Though it is not necessary, however, even if I were to make fresh search about existence of any material on record, even then the only purported material is, the letter dt. 22.1.1991, a look at this letter dt. 22.1.1991 does show, that the grounds given therein are the grounds for acquisition, and nothing has been shown, as to what was the urgency, to dispense with the enquiry, so much so that even this was not disclosed as to since when the applicants are registered, and waiting for the tenements. It is a different story that, the acquisition is not for Dalits, or

Tribes, but is for low income group persons, and for economically backward persons, who obviously need not necessarily be Dalits or Tribes. In this background the further notes on the file being para-69, 70 and 71 are also no less important, inasmuch as though these notes are of the date after notification under Section 17(4), but then a bare comprehension thereof does show, that even according to the Housing Board, the land is inadequate, and is not economically viable, and it was contemplated that the Board should find some other land which may be cheaper, including Government Siwai Chak land. This, in any case, does show, that apart from the fact that there was no material available with the competent authority to arrive at satisfaction about existence of urgency requiring dispensation of enquiry under Section 5-A, the notification has been issued in a wholly mechanical manner, without any application of mind at all, and when the factual position was represented to the State, the facts as appearing in para-69 to 73 were revealed. Thus in my view, there is no escape from the conclusion, that had the mind been applied on the aspect of existence of urgency, facts as has been noticed in these paras would have been available for consideration, and they would have positively shown, that there was possibly no case for invoking urgency clause, so as to dispense with the enquiry under Sec. 5-A.

Even after going through the entire file of the

State, as requisitioned vide order dt. 24.5.2006, coupled with the letter dt. 22.1.1991 of the Secretary, Housing Board, I do not find any material on record, on the basis of which the requisite satisfaction could be recorded, and the letter, as noticed above, also is only a request, and does not disclose any urgency.

Thus, the net result of the aforesaid discussion is that the notification Annexure-5 cannot be sustained, and is required to be quashed. So far as notification Annexure-1 is concerned, since Annexure-5 has been quashed, the petitioner would have the opportunity to raise the objection, and enquiry shall be made under Section 5-A, and obviously thereafter only appropriate decision shall be taken by the competent authority: however, as at present I do not stand advised to quash Annexure-1. So far challenge to this notification on the ground of non compliance of the provisions regarding publication is concerned, that ground has already been negatived.

Accordingly the writ petition is partly allowed. The notification Annexure-5 is quashed, and the respondents are directed to proceed afresh from the stage of publication of notification under Section 4, receive objections under Section 5-A, and hold appropriate enquiry, and then decide the matter objectively and dispassionately, in accordance with law. The parties shall bear their own

costs.

(N.P.GUPTA),J.

/Sushil/